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No. 95-1478

In the Supreme Court of the United States

OCTOBER TERM, 1995

JAY PRINTZ, SHERIFF/CORONER,
RAVALLI COUNTY, MONTANA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The Brady Handgun Violence Prevention Act, 18 U.S.C. 922(s)(2), provides, *inter alia*, that, within five business days of a firearms dealer's proposal to transfer a handgun, the "chief law enforcement officer" (the chief of police or sheriff) shall make a "reasonable effort" to ascertain whether the transferee's receipt or possession of the handgun would be in violation of the law. The question presented is whether the Brady Act exceeds Congress's power under the Commerce Clause or contravenes the Tenth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 66 F.3d 1025. The opinion of the district court (Pet. App. 30a-66a) is reported at 854 F. Supp. 1503.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1995. A petition for rehearing was denied on December 19, 1995. Pet. App. 28a-29a. The petition for a writ of certiorari was filed on March 15, 1996. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Gun Control Act of 1968 (GCA), 18 U.S.C. 921 *et seq.*, establishes a comprehensive federal regulatory scheme governing the manufacture and distribution of firearms in interstate commerce. Under the GCA, it is unlawful for certain persons, such as convicted felons and fugitives from justice, to receive or possess firearms in interstate commerce. See 18 U.S.C. 922(g). Under the GCA, it is also unlawful for any person to transfer a firearm to another, knowing that the transferee is prohibited by Section 922(g) from receiving or possessing a firearm. See 18 U.S.C. 922(d).

In the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, Tit. I, 107 Stat. 1536 (1993) (Brady Act), Congress amended the GCA to address the national "epidemic of gun violence" by enhancing enforcement of its restrictions on gun transfers. See H.R. Rep. No. 344, 103d Cong., 1st Sess. 7-8 (1993). The Brady Act requires the federal government to establish a national instant criminal background check system by November 30, 1998. 18 U.S.C. 922 note. Once the national instant criminal background check system is in place, firearms dealers will be required (with certain exceptions) to contact that system to determine whether any legal impediment exists to the sale of a firearm. See 18 U.S.C. 922(t)(1)(A).

Because the national instant criminal background check system may not be fully operative until late 1998, Congress also enacted interim provisions to enhance enforcement of the GCA's transfer restrictions. Those interim provisions, which are the subject of this case, operate in relation to proposed

transfers of handguns by federally licensed firearms dealers. Under the interim provisions, firearms dealers who propose to transfer a handgun must provide the "chief law enforcement officer" (CLEO) of the transferee's residence[1] with information about the proposed transfer, and may not make the transfer until five business days have elapsed after providing such notice. See 18 U.S.C. 922(s)(1)(A). If, within that five-day period, the CLEO informs the dealer that the CLEO has no information that the transferee's receipt or possession of a handgun would be illegal, then the transfer may go forward. See 18 U.S.C. 922(s)(1)(A)(ii)(II). The transfer may also go forward after five days if the dealer receives no information from the CLEO at all. See 18 U.S.C. 922(s)(1)(A)(ii)(I).

To enable CLEOs to determine whether receipt of a handgun would be illegal, prospective handgun purchasers must provide firearms dealers with their name, address, and date of birth. 18 U.S.C. 922(s)(1)(A)(i)(I), 922(s)(3)(A). The dealer must then give that information to the jurisdiction's CLEO. 18 U.S.C. 922(s)(1)(A)(i)(III) and (IV). During the ensuing five-day waiting period, the CLEO "shall make a reasonable effort" to determine whether a legal impediment exists to the proposed sale:

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[1] The Brady Act defines the "chief law enforcement officer" as "the chief of police, the sheriff, or an equivalent officer or the designee of any such individual." 18 U.S.C. 922(s)(8). The Brady Act's interim provisions do not apply in States and Territories that have their own background check requirements. 18 U.S.C. 922(s)(1)(C) and (D); see 59 Fed. Reg. 37,532, 37,534 (1994).

> A chief law enforcement officer to whom a transferor has provided notice * * * shall make a reasonable effort to ascertain within 5 business days whether receipt or possession [of the handgun] would be in violation of the law, including research in whatever State and local record-keeping systems are available and in a national system designated by the Attorney General.

18 U.S.C. 922(s)(2). It is the provision for a "reasonable effort to ascertain" whether receipt or possession of the handgun would be illegal to which petitioner objects.

Shortly after enactment of the Brady Act, the Bureau of Alcohol, Tobacco and Firearms (ATF), which is charged with interpretation and implementation of the GCA (see 18 U.S.C. 926; 37 Fed. Reg. 11,696-11,697 (1972)), issued an open letter providing guidance to CLEOs on, *inter alia*, the "reasonable effort" provision. App., *infra*, 13a-17a. ATF explained that, since CLEOs themselves are in the "best position to determine" what constitutes a "reasonable effort," *id.* at 15a, "[e]ach * * * CLEO will have to set it[s] own standards based on its own circumstances, *i.e.*, the availability of resources, access to records, and taking into account the law enforcement priorities of the jurisdiction." *Id.* at 14a-15a. ATF further explained that, while the Brady Act generally "anticipates some minimal effort to check commonly available records," CLEOs are not obliged to check "every conceivable record system that may contain information relating to categories of prohibited persons." *Id.* at 13a-14a. ATF also made clear that, since the "vast majority of [disqualified] persons * * * are prohibited by virtue of some criminal background," a CLEO's reasonable effort should normally focus on criminal history records. *Id.* at 14a. Finally, ATF stated that, in some circumstances, as when a CLEO has personal knowledge of a gun purchaser, a CLEO may legitimately decide that it is "reasonable" to do little or no research. *Ibid.*

The Brady Act does not require that a CLEO act to prevent the transfer of a handgun if the CLEO concludes that the purchaser's receipt of the gun would be illegal. Thus, if the CLEO determines, for investigative or law enforcement purposes, that the transfer should be permitted to go forward, the CLEO may decline to inform the firearms dealer that the transfer is unlawful. If, however, the CLEO finds no impediment to the proposed handgun sale, the records related to the referral from the firearms dealer must be destroyed. 18 U.S.C. 922(s)(6)(B)(i). And if the CLEO determines that the prospective purchaser's receipt of the handgun would be unlawful and so informs the dealer, the prospective purchaser may request that the CLEO provide written reasons for the determination within 20 business days. 18 U.S.C. 922(s)(6)(C). The Brady Act provides CLEOs with immunity from damages actions for failing to prevent an unlawful handgun sale, or for mistakenly concluding that a transfer would be contrary to law. 18 U.S.C. 922(s)(7).

2. Petitioner is the Sheriff of Ravalli County, Montana. Pet. App. 4a. He contended that several of the Brady Act's interim requirements, including the requirement that he make a "reasonable effort" to ascertain if there is a legal impediment to a handgun sale, violate the Tenth Amendment. *Id.* at 32a. The district court held that the "reasonable effort" requirement violates the Tenth Amendment. *Id.* at

66a. It concluded, however, that the Tenth Amendment was not contravened by the requirement that CLEOs destroy records relating to background checks, or that CLEOs provide their reasons for determining that receipt of a handgun would be unlawful. *Id.* at 61a-63a. The court also held that the "reasonable effort" provision is severable from the remainder of the Brady Act, including the Act's five-day waiting period for handgun sales. *Id.* at 66a.[2]

Both parties appealed, and a divided panel of the court of appeals upheld the Brady Act in its entirety. Pet. App. 1a-25a.[3] The court concluded that the Brady Act does not transgress any "implied limitation on federal power," *id.* at 8a, and that there is "nothing unusually jarring to our system of federalism" in the challenged provisions of the Brady Act, *id.* at 9a. The court noted that this Court has rejected the argument that "Congress has no power to impose on a

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[2] Petitioner also contended that the Brady Act's provision for criminal penalties for willful violations of Section 922(s) (see 18 U.S.C. 924(a)(5)) violates the Due Process Clause of the Fifth Amendment as applied to him. Pet. App. 32a. The district court concluded, however, that the criminal penalties do not apply to CLEOs' background-check determinations made under Section 922(s). Pet. App. 42a. The court of appeals held that petitioner's Fifth Amendment claim was not ripe for review because he did not face a "credible threat of prosecution." *Id.* at 19a. Petitioner has not renewed his Fifth Amendment claim in his certiorari petition.

[3] The court of appeals decided this case in conjunction with a similar appeal and cross-appeal raising the same issues in a challenge brought by Richard Mack, the Sheriff of Graham County, Arizona. See Pet. App. 1a-6a. Sheriff Mack has filed a separate petition for a writ of certiorari to review the judgment below. *Mack* v. *United States*, No. 95-1503 (filed Mar. 28, 1996).

State officer, as such, any duty whatever, and compel him to perform it," as "not representative of the law today." *Ibid.* (quoting *FERC* v. *Mississippi*, 456 U.S. 742, 761 (1982)).

The court rejected in particular petitioner's contention that, under *New York* v. *United States*, 505 U.S. 144 (1992), "the federal government is now flatly precluded from commanding state officers to assist in carrying out a federal program." Pet. App. 10a. The court explained that "[t]he constitutional evil that *New York* addressed was one recognized by several of [this Court's previous cases]: the federal government was attempting to direct the States to enact their own legislation or regulations according to a federal formula." *Ibid.* The court noted that "federal coercion of a State's enactment of legislation or regulations or creation of an administrative program" raises Tenth Amendment concern, because that coercion impinges on the States' sovereign authority to set policy, and also undermines political accountability. *Id.* at 13a. As the court explained, "[w]hen the federal government requires the States to enact legislation, the enacted legislation is *state* legislation. Thus, it will likely 'be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.'" *Ibid.* (quoting *New York*, 505 U.S. at 169).

The court concluded that the Brady Act "is not the kind of a federal mandate condemned by *New York*." Pet. App. 14a. It stressed that CLEOs "are not being commanded to engage in the central sovereign processes of enacting legislation or regulations" and "are not even being asked to produce a state policy,

for which the state must bear political accountability." *Ibid.* Moreover, it stated, CLEOs' "activities are not alien to their usual line of work, and represent a minimal interference with state functions. In that sense, their duties are not different from other minor obligations that Congress has imposed on state officials." *Ibid.*

Although the court assumed that "there is likely to be some point at which a federal statute that enlists the aid of state employees can become so burdensome to the State that it violates the Tenth Amendment," it concluded that "the Brady Act does not approach that point." Pet. App. 15a. It observed that petitioner has not been subjected to any requirement to do more "than check computer records" (*id.* at 15a-16a), and it stated that, on such a record, it "[could not] conclude that 'a reasonable effort' inevitably requires more than [a] minimum for [petitioner]. To perform such computer checks * * * has not been shown to constitute the kind of interference with state functions that would raise Tenth Amendment concerns." *Id.* at 16a.[4]

3. After the court of appeals issued its decision in this case, two other courts of appeals ruled on similar constitutional challenges to the Brady Act. The Second Circuit upheld the constitutionality of the Brady Act. *Frank* v. *United States*, 78 F.3d 815 (1996). The Fifth Circuit, however, held that the provisions of the Brady Act challenged in the present case violate the Tenth Amendment. *Koog* v. *United States*, 79 F.3d 452 (1996).

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[4] Judge Fernandez dissented in part. He would have held unconstitutional the Brady Act's requirement that CLEOs make a reasonable effort to determine whether the proposed transfer of a handgun would violate the law. Pet. App. 22a-25a.

DISCUSSION

Petitioner contends that the Brady Act's interim requirement that CLEOs make a "reasonable effort" to ascertain if there is a legal impediment to a handgun sale violates the Tenth Amendment. Petitioner argues that the court of appeals' decision conflicts with *New York* v. *United States*, 505 U.S. 144 (1992). Those contentions are incorrect. The Brady Act is consistent with the long-settled understanding that Congress may impose certain duties on state officials to carry out federal law. It does not present the threats to sovereignty and accountability, the values protected by the Tenth Amendment, that were present in the statute reviewed in *New York* v. *United States*.

Nevertheless, the Fifth Circuit has now ruled, in conflict with the decision below and with a decision of the Second Circuit, that the Brady Act does violate the Tenth Amendment. The Fifth Circuit concluded that Congress "has transgressed the Tenth Amendment principle that it may not 'commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'" *Koog* v. *United States*, 79 F.3d 452, 453 (1996) (quoting *New York* v. *United States*, 505 U.S. at 176). It reasoned that the interim duties imposed on CLEOs "are tantamount to forced state legislation" (79 F.3d at 458); that the Brady Act "undermines state sovereignty by requiring a State to allow CLEOs to perform duties that the State obviously prefers to avoid" (*id.* at 460); and that the Brady Act "blurs accountability" because, the court reasoned, "[f]or citizens that encounter the palpable consequences of this law, Congress is nowhere to be found"

(*id.* at 460). The Fifth Circuit acknowledged that its decision conflicts with the decision below in this case. *Id.* at 461.

Because of the conflict in the circuits on the constitutionality of an Act of Congress, and the significance of the question of federal constitutional law presented by the petition, we agree with petitioner that this case warrants the Court's review. The Brady Act is an important federal statute directed at one of the most serious issues of public safety currently facing the nation, the "epidemic of gun violence." See H.R. Rep. No. 344, 103d Cong., 1st Sess. 7-8 (1993). Accordingly, the issue of the constitutionality of the Brady Act's "reasonable effort" provision should be decided by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

[SEAL]

DEPARTMENT OF THE TREASURY
BUREAU OF ALCOHOL, TOBACCO AND FIREARMS
WASHINGTON, D.C. 20226

JAN 21 1994

OPEN LETTER TO STATE AND LOCAL
LAW ENFORCEMENT OFFICIALS

The purpose of this letter is to disseminate information to all State and local law enforcement agencies regarding Public Law 103-159, 107 Stat. 1536 (hereafter, "the Act"), signed by the President on November 30, 1993. It is also intended to provide law enforcement agencies with the Bureau of Alcohol, Tobacco and Firearms' (ATF) interpretation of the Act so that you will be better able to fulfill the requirements the Act imposes on "Chief Law Enforcement Officers" (CLEO) throughout the Nation. ATF places a high priority on ensuring that you are provided with accurate and reliable information regarding this matter.

First, we hope that you will undertake a thorough reading of the Act, a copy of which we have enclosed with this letter. Your examination will reveal that the Act contains three separate sections; **Title I, Brady Handgun Violence Protection Act (hereafter, "Brady"), commonly referred to as the Brady Bill, is effective February 28, 1994;** Title II, Multiple Firearm Purchases to State and Local

Police, was effective November 30, 1993; and Title III, Federal Firearms License Reform Act of 1993, was also effective November 30, 1993.

OVERVIEW

By way of background, the Act amended the Gun Control Act of 1968 (GCA). Consequently, ATF is the Federal agency responsible for implementing the Act, except for those functions expressly charged to the U.S. Attorney General. **You should be aware that all of the Brady provisions we will be covering in this letter are interim provisions. The permanent provisions of Brady, establishing a national instant criminal background system, are initially the responsibility of the Department of Justice (DOJ).** We will provide a more detailed view of the Attorney General's functions later in this letter.

Since 1968, the GCA has required that all manufacturers, importers, dealers, and pawnbrokers in firearms have to be licensed by ATF. Additionally, under the GCA, Federal firearms licensees (FFL) can generally sell firearms to residents of their own State, must abide by State and local laws in making their sales, and must keep detailed records of all firearms transactions. Required records and firearms inventories are subject to ATF inspections. In addition, FFLs are prohibited from selling firearms to anyone they *know or have reasonable cause to believe:*

- is under indictment for or convicted of a felony
- is a fugitive from justice
- is an unlawful user of or addicted to controlled substances

- has been adjudicated a mental defective or committed to a mental institution
- is an illegal alien
- has a dishonorable discharge or
- has renounced his citizenship

Until Brady, the only Federal requirement aimed at preventing a felon or other prohibited person from purchasing a firearm was that purchasers complete a Federal form, ATF F 4473, on which they would certify to their name, residence, and that they do not fall within one of the above categories of persons prohibited from receiving a firearm.

Brady has added an additional means of screening out prohibited purchasers by imposing a 5 business day waiting period during which time the dealer is required to notify the CLEO of the purchaser's residence of the proposed sale of a handgun. *You should also be aware that Brady's 5-day waiting period applies to unlicensed individuals who are attempting to obtain a handgun(s).*

ATF is closely coordinating our implementation of Brady with the DOJ. Under Brady, the DOJ is responsible for the development of a national instant criminal background check system that will replace the 5-day waiting period system within 5 years. DOJ is also responsible for designating the national system of records that the CLEO should check when making a determination about the purchaser's eligibility to acquire a handgun. The U.S. Attorney General has designated the National Crime Information Center (NCIC), including a wanted person check and the Interstate Identification Index. For your

convenience, we have enclosed a draft copy of ATF F 5300.35 (Interim) that ATF will use for the Brady statement. If you will examine the instructions part of the form, you will see a reference to the NCIC in item 2 under the "Instructions to Chief Law Enforcement Officers" caption.

The contents of the buyer's statement of intent to obtain a handgun is specifically limited by Brady. The only identifying information we can require the buyer to provide to the FFL is the buyer's name, address, and date of birth. Obviously, it is often not possible to conduct a reasonably accurate criminal background check with only this information. While we cannot insist on more information, we are asking the buyers, on ATF F 5300.35 (see enclosure), to provide their social security number, place of birth, and other descriptive information on an optional basis. In asking for this information, we explain that it is in the buyer's self-interest to provide the additional information to "help avoid the possibility of being misidentified as a felon or other prohibited person."

Due to time constraints we faced in getting a form designed, approved, printed, and distributed prior to February 28, we were not able to fully consult with State and local law enforcement officials in our initial form design. However, we believe that it is essential that the form is designed in such a way as to meet the CLEO's needs. Consequently, the initial form is being introduced as a temporary form, with a limited printing. Before we finalize the form, we want the comments and recommendations of the State and local officials who will be using it.

TITLE I - BRADY

The greatest immediate task before us is to implement the waiting period aspect of Brady by February 28, 1994. Prior to that date, ATF will issue temporary regulations telling dealers how to comply with the new law, and ATF will also distribute the Brady statement form, ATF F 5300.35. In the interim, we will be working with you to ensure State and local law enforcement officials understand the law by ensuring that you know your responsibilities, liabilities, and options.

As you begin to thoroughly examine the contents of Brady, you should keep in mind its primary intent is to provide law enforcement an opportunity to screen out unlawful purchasers. Our goal is to see that Brady is as effective as possible at keeping handguns out of the wrong hands.

We believe that a typical example of a handgun sale, as envisioned under Brady, would be:

> An individual goes to an FFL and fills out an ATF F 5300.35 (Statement of Intent To Obtain A Handgun) and certifies that he/she is not a prohibited person. The FFL is required to complete the form and verify the identity of the person by examining a valid government-issued identification document that contains the individuals name, address, date of birth, and photograph. Within 1 day, the FFL contacts the individuals CLEO and provides the name, address, and date of birth to the CLEO. Also, within 1 day, the FFL forwards a copy of ATF F 5300.35 to the CLEO. The FFL must then wait 5 business days to provide the

CLEO the opportunity to respond. Upon being notified, and within the 5 days, the CLEO makes a "reasonable effort" to determine whether the individual is a prohibited person under the law.

The CLEO makes a determination based upon information available to him/her. The CLEO finds nothing that would give him/her "reason to believe" that the individual is a prohibited person and, although not required to do so, the CLEO contacts the FFL and tells the FFL it is okay to sell the handgun.

MAJOR ISSUES

Under Brady, there are several major issues that we face as we attempt to implement its requirements, such as:

- What States have existing laws that would qualify as alternatives to the 5-day waiting period?
- Who are the CLEOs for purposes of the criminal record checking requirements?
- What form of notice must the FFL make to the CLEO?
- What is a "reasonable effort?"

ATF's nearly 25 years of previous experience with the Federal firearms laws under the GCA provides us with a solid foundation to correctly interpret many of these issues, and, coupled with the input and assistance from the law enforcement community, we are

confident that these and other issues will soon be resolved.

ALTERNATIVES TO BRADY

One major aspect of Brady is that there are a series of alternatives to the notice and 5-day waiting period requirements. Some of these alternatives will essentially make those Brady requirements inapplicable in many States. ATF's Office of Chief Counsel has completed a study of all States to determine which States currently have laws that would qualify as alternatives to the 5-day waiting period requirements. For your convenience, we have enclosed a list of our *preliminary* findings.

The five alternatives to the 5-day waiting period generally are:

1. *Threat to life*—Allows the transferee (buyer) to present the FFL a written statement from the buyer's CLEO stating that the buyer needs a handgun because the buyer or his/her household member has received a threat on his/her life. The written statement must be dated within the 10-day period of the buyer's most recent attempt to obtain a handgun. An example of this transaction would typically be a situation where the buyer receives a threat against his/her life and goes to an FFL expecting to immediately obtain a handgun for personal protection. (This would be the beginning of the above 10-day period.) After being told about the 5-day waiting period by the FFL, the buyer contacts his/her CLEO and requests the CLEO to

issue such letter. If the CLEO agrees with the buyer's request, the buyer returns to the FFL, presents the written statement, and purchases the handgun. **You should be advised that Brady does not compel the CLEO to issue such letter.**

ATF does not anticipate very many of these type of transactions occurring. However, because of the potential impact of this type of transaction, you should bear this alternative in mind when deciding who the designated CLEOs may be in your State.

2. *Purchase permits*—A buyer goes to an FFL and presents a State permit to obtain a handgun that was issued not more than 5 years earlier. The permit must be from the State where the transfer of the handgun is to take place. The permit must also have been issued only after an authorized government official has verified that available information does not indicate that the buyer's possession of a handgun would violate the law.

ATF believes that this alternative provision will apply in the alternative States listed on the enclosed list of States. We should point out that this section of Brady does not specify what information must be checked by the authorized government official in verifying the buyer's status to possess a handgun. **ATF believes that a State meets the requirements of this section of Brady if the state law requires that prior to the issuance of the permit, an authorized government official has verified that the**

"available information" does not indicate that possession by the buyer (transferee) would violate the law.

3. *Instant check systems*—A buyer goes to an FFL to purchase a handgun in a State that has an instant check system that requires the FFL to verify (usually while the buyer waits) the buyer's eligibility to possess a handgun by contacting an authorized government official prior to completing the transaction. Such systems are generally designed to work through computer terminals or "900 number" telephone-links from the FFL to a central point within the State where the buyer's background check is made.

ATF believes that this alternate provision of Brady will apply in the alternative States with instant check systems that are listed on the enclosed list of States. As in the case of purchaser permits, this section of Brady does not specify what information the authorized government official must check prior to notifying the FFL of the buyer's status to possess a handgun. **It is ATF's position that States meet the requirements of this section of Brady if the law of the State requires that, prior to the transfer of a handgun, an authorized government official has verified that the "available information" does not indicate that possession by the buyer (transferee) would violate the law.**

4. *Secretary approval*—Some handguns are subject to transfer approval under section 5812 of the Internal Revenue Code of 1986. For example, smooth bore pistols or revolvers. These firearms are required to be registered with ATF, and transfers of these firearms require the approval of ATF. Strict background checks are made on any individual who desires to receive approval to possess this type of firearm. Only a relatively small number of FFLs are qualified to handle firearms transactions of this kind. Additionally, a transfer tax is levied and paid before any transfer to an individual is approved by ATF.

5. *Impractical transactions*—There may be some areas of the Nation where the FFL is located in a place that is extremely remote in relation to the CLEO and the ratio of CLEOs in the State to number of square miles of land area does not exceed .0025. This would also need to be an area where there are no telecommunications systems. If an FFL's business location meets these requirements, he/she can request that ATF certify that the FFL need not meet the requirement to notify the CLEO of the buyer's intent to obtain a handgun because it is impractical.

Before ATF will issue any certification to an FFL stating that because his/her business location is "extremely remote" it would be "impractical" for him/her to comply with the notification of the CLEO, we will require additional data. ATF regulations will require that the FFL provide sufficient written data to support all of the criteria that would make his/her location qualify.

The following captions, CLEO, FORM OF NOTICE TO CLEO, and REASONABLE EFFORT, will cover information that will be critical to law enforcement officials in those States that will be subject to the 5-day waiting period requirements of Brady.

CLEO

On February 28, 1994, in States and for sales that are not alternatives to Brady, FFLs will begin contacting the CLEO for the jurisdiction where the buyer lives in order to provide the CLEO with certain information identifying a potential buyer. The law defines the term "chief law enforcement officer" to mean, "the chief of police, the sheriff, or an equivalent officer, or the designee of any such individual." While the law itself is broad enough, in some cases, to give the FFL more than one official to contact, we believe the law will clearly permit law enforcement officials to agree that, within a given jurisdiction, one agency will serve the role as CLEO. It is essential that State and local law enforcement officials agree, within a given jurisdiction, that one agency will serve the role of chief law enforcement officer, for purposes of which agency should receive the notice of handgun sales. Letters have been sent to all State Attorney Generals advising them of this key issue.

In the coming weeks, ATF representatives from the Office of Law Enforcement, Compliance Operations, and Assistant Chief Counsel will be meeting with law enforcement officials of each State for the purpose of explaining the provisions of Brady and its effect on your jurisdiction. Initially, these meetings will be targeted for those States that are subject to the 5-day

waiting period requirements of Brady, as shown on the enclosed list of States.

We urge you to work with your counterparts on the State and local level to decide who will be the CLEO for your area. Your discussions should also include consideration of the designation of the CLEO for the purposes of the "threat to life" alternative that was previously referenced and the "multiple sales reports" that are referred to later in this letter. Once you have reached a determination, ATF will be able to inform the FFLs when they begin calling us on February 28. **ATF's regulations will make it clear to FFLs that they will be required to abide by instructions from State and local officials as to which agency to contact.**

FORM OF NOTICE TO CLEO

Brady requires that within 1 day of the buyer's completion of the ATF F 5300.35, the FFL must "provide notice" to the CLEO of the contents of the form. If that is done orally, the FFL must also within 1 day, transmit a copy of the ATF F 5300.35 to the CLEO. The law clearly contemplates that notice of the contents of the ATF F 5300.35 will often be separate from the form being sent through the mail. Nonetheless, if the ATF F 5300.35 is faxed to the CLEO for example, both notice and transmittal of ATF F 5300.35 occur simultaneously. **In any event, ATF's position is that the 5-day waiting period runs from the time the CLEO receives actual notice of the contents of the ATF F 5300.35 not from the time ATF F 5300.35 is received by the CLEO.**

While Brady permits oral notice of the contents of ATF F 5300.35, ATF does not view this as an obligation that CLEOs must set up a system to accept this information over the telephone. **Just as we will require FFLs, by regulation, to comply with your designation as to which agency will serve as the CLEO, we will also require FFLs, by regulation, to abide by your instructions as to the manner in which you will accept *actual notice* of a buyer's attempt to obtain a handgun.**

REASONABLE EFFORT

Brady requires the CLEO to "make a reasonable effort to ascertain within 5 business days whether the buyer's receipt or possession of a handgun would be in violation of law, including research in whatever State and local recordkeeping systems are available and in a national system to be designated by the Attorney General." Receipt or possession of firearms would violate the Federal law if the buyer falls in any of the categories in item 6 of ATF F 5300.35, i.e. felons, fugitives, etc. State and local laws may expand on these categories and include, for example, violent misdemeanors or habitual drunkards.

The obvious question that Brady raises is what will constitute a "reasonable effort," both in terms of an initial criminal record search and the degree of followup on searches with incomplete findings. Before we answer this question, we need to provide you with a little more background information.

In terms of the initial search, the law clearly anticipates some minimal effort to check commonly

available records. It is not realistic to expect the CLEO to have available, or check, every conceivable record system that may contain information relating to categories of prohibited persons. The vast majority of persons who are prohibited from possessing a handgun are prohibited by virtue of some criminal background. Accordingly, a reasonable effort should be made to determine whether the buyer has a criminal record that would make the sale unlawful. Criminal record systems can reveal that the buyer is a fugitive, is under indictment, or has been convicted of a felony. The criminal record systems may also indicate that the buyer is possibly an unlawful user of controlled substances or has had mental health problems. In some States, centralized mental health records may be available. Since Federal prohibitions include persons adjudicated mentally defective or who have been committed to a mental institution, these records could also be searched if accessible.

With potentially thousands of law enforcement agencies functioning as CLEOs, it is difficult to prescribe precisely what must be done in every instance. The level of research may justifiably vary among law enforcement agencies. In rural, sparsely populated counties where many handgun purchasers are personally known to the CLEO, little or no research may be necessary in many cases. In densely populated urban areas, every potential buyer might be run through the available computer records to determine whether any disqualifying information is on file. Each law enforcement agency serving as the CLEO will have to set it[s] own standards based on its own circumstances, *i.e.*, the availability of resources,

access to records, and taking into account the law enforcement priorities of the jurisdiction. The law is designed so that the law enforcement authority who is doing the check, is the one who is most likely to have to deal with the consequences of the buyer obtaining a handgun. Therefore, the CLEO of the buyer's residence has a vested interest in conducting an appropriate check and ultimately is in the best position to determine what is reasonable.

Brady does not require you to report back to the FFL with your findings on the buyer's status. However, unless the FFL hears from you, he/she can complete the sale after 5 business days have elapsed from the time the FFL gave you ***actual notice*** of the contents of the buyer's statement, as contained on ATF F 5300.35. If, during the 5 days, you obtain information that would indicate that the buyer is prohibited under Federal, State, or local law from receiving or possessing a handgun, you can choose from a number of responsible options. First, you may decide to simply notify the FFL that the transaction would be illegal, in which case the FFL would be prohibited from completing the sale. If the ineligible buyer is a fugitive, or someone you already have under investigation, you may set up a surveillance and arrest the buyer when he/she returns to pick up the handgun. You may choose to turn the matter over to another law enforcement agency that has an interest in the buyer. These options, and variations of these options, are virtually limitless and will ultimately be determined by your particular circumstances.

Now, getting back to the question of what constitutes a "reasonable effort." To answer this question, it is necessary to examine various key elements of the

GCA and the Brady amendments. As noted earlier, under the GCA, the FFL need not have definitive information that the buyer is a prohibited person. He/she is prohibited from making a sale if he/she has **"reasonable cause to believe"** that the buyer is a prohibited person. An example of this would be if you told an FFL not to sell a firearm to a person whom you knew had recently been convicted of a felony or had recently been indicted for a felony offense. Since the enactment of the GCA in 1968, this very situation has occurred many thousands of times. Brady now makes it unlawful for the FFL to sell a handgun unless 5 days have lapsed and the **FFL has not received information from the CLEO that receipt or possession of the handgun by the buyer would violate the law**. Brady also requires the CLEO to destroy the buyer[']s statement (ATF F 5300.35) and any record generated from the statement within 20 days after it was made, unless the CLEO determines that a transaction would violate Federal, State, or local law. Finally, Brady provides that the CLEO shall not be liable for damages for preventing a sale or transfer of a handgun to a buyer who may lawfully receive or possess a handgun.

Since it is unlawful for an FFL to transfer a handgun if he has "reasonable cause to believe" the buyer is prohibited, ATF believes that this is the standard that should govern the CLEO's notification to FFLs. In other words, where you locate information that would lead you to believe that the buyer might be prohibited from acquiring a handgun, you would be justified in reporting to the FFL that you have "reasonable cause to believe" that the buyer is a prohibited

person. However, you should make every reasonable effort to determine a disposition of a criminal charge which would be a felony. If the buyer wants to contest his/her status, you can be in the position of shifting the burden of tracking down absolute proof to the buyer. If the buyer can provide you with criminal disposition records or other documents that establish that he/she is not prohibited from receiving or possessing a handgun, you could then notify the FFL that you have withdrawn your objection to the sale.

Note: You are not required to advise the FFL of the circumstances upon which your advice was based. All you need to advise the FFL is that you have reason to believe that the buyer's possession of a handgun would/would not violate the law.

TITLE II - REPORTS OF MULTIPLE HANDGUN SALES TO STATE AND LOCAL POLICE

This section of the Act (see enclosure) amends section 923(g)(3) of the GCA to read as follows:

(A) "Each licensee shall prepare a report of multiple sales or other dispositions whenever the licensee sells or otherwise disposes of, at one time or during any five consecutive business days, two or more pistols, or revolvers, or any combination of pistols and revolvers totalling two or more, to an unlicensed person. The report shall be prepared on a form specified by the Secretary and forwarded to the office specified thereon and to the department of State police or State law enforcement agency of the State or local law

enforcement agency of the local jurisdiction in which the sale or other disposition took place."

(B) "Except in the case of forms and contents thereof regarding a purchaser who is prohibited by subsection (g) or (n) of section 922 of this title from receipt of a firearm, the department of State police or State law enforcement agency or local law enforcement agency of the local jurisdiction shall not disclose any such form or the contents thereof to any person or entity, and shall destroy each such form and any record of the contents thereof no more than 20 days from the date such form is received. No later than the date that is 6 months after the effective date of this subparagraph, and at the end of each 6-month period thereafter, the department of State police or State law enforcement agency or local law enforcement agency of the local jurisdiction shall certify to the Attorney General of the United States that no disclosure contrary to this subparagraph has been made and that all forms and any record of the contents thereof have been destroyed as provided in this subparagraph."

You should note that "the department of State police or State law enforcement agency of the State, or local law enforcement agency" referred to in this section of the Act, is somewhat different than what is contained under the definition of a CLEO in Brady. *You should also be advised that this section of the Act will apply to all States, not just those States that do not have acceptable alternatives to the 5-day waiting period.* **However, as in Brady, ATF's regulations will make it clear to FFLs that they will be required**

to abide by instructions from State and local officials as to where the multiple sales reports are to be sent.

In practical terms, these amendments will result in your department being notified, through receipt of an ATF F 3310.4, anytime an FFL sells two or more handguns to any unlicensed person during any 5 consecutive business days. This new law does not require you to conduct any inquiry into the buyer's background to ascertain whether his/her receipt or possession of a firearm would be in violation of the law, nor does it contain any provision that would prohibit you from conducting such an inquiry.

ATF will be notifying all FFLs of the new requirements for multiple firearms sales reporting to State or local law enforcement agencies. We will also instruct them to use the current ATF F 3310.4, Report of Multiple Sale or Other Disposition of Pistols and Revolvers, which is identified as Copy 2-ATF Group/POD, until the amended form is printed and becomes available for their use. For your convenience, we have enclosed a draft copy of the revised ATF F 3310.4.

You may soon be receiving copies of the current ATF F 3310.4 from FFLs in your jurisdiction. You should be advised that this new statute prohibits State and local law enforcement agencies from disclosing the form or the contents thereof to any person or entity and that they shall destroy such form and any record of the contents thereof no more than 20 days from the date such form is received. The only exceptions to this requirement would be in those cases involving a purchaser who is prohibited from receiving a firearm under 18 U.S.C. §§ 922(g) and (n), i.e. convicted felon,

fugitive, illegal drug user, mental defective, illegal alien, dishonorably discharged, renounced citizenship, and those under indictment for a felony offense.

Currently, we are not aware of what procedures the U.S. Attorney General will institute to address the 6-month disclosure certifications that are referenced under 18 U.S.C. § 923(g)(3)(B).

TITLE III - FEDERAL FIREARMS LICENSE REFORM ACT OF 1993

COMMON AND CONTRACT CARRIERS

The amendments to the GCA in this section of the Act, covering common and contract carriers, were intended to impact incidents of thefts of firearms from interstate shipments, and you should be familiar with their content.

First, section 922(e), which is the Federal law that generally requires any person to provide written notice to a common or contract carrier anytime a package or container in which there is any firearm or ammunition is to be shipped, was amended as follows:

> "No common or contract carrier shall require or cause any label, tag, or other written notice to be placed on the outside of any package, luggage, or other container that such package, luggage, or other container contains a firearm."

The effect of this amendment is that common or contract carriers are now prohibited from requiring or causing the placing of any information on the outside of any package, luggage, or container that would identify the contents as containing a fire-

arm(s). This labeling prohibition also includes the transportation or shipment of any firearm(s) aboard any common or contract carrier by any passenger who delivers the firearm(s) into the custody of the pilot, captain, conductor, or operator for the duration of the trip. However, you should be aware that the Act does not apply to the transportation or shipment of ammunition.

Second, section 922(f), which is the Federal law that generally prohibits common or contract carriers from knowingly transporting or delivering in interstate or foreign commerce any firearm or ammunition with knowledge or reasonable cause to believe that the shipment, transportation, or receipt thereof would violate the Federal firearms laws, was amended as follows:

> "It shall be unlawful for any common or contract carrier to deliver in interstate of foreign commerce any firearm without obtaining written acknowledgement of the receipt from the recipient of the package or other container in which there is a firearm."

Although the Act's amendment to section 922(f) requires little clarification, you should note that common and contract carriers are not required to obtain written notification of receipt from the recipient for deliveries of ammunition. Furthermore, we do not believe that the amendment to section 922(f) applies to the return of a firearm by a carrier to a passenger who placed his/her firearm in the carrier's custody for the duration of the trip.

THEFT OF FIREARMS FROM FFLS AND FFL LICENSE FEES

The amendments to the GCA in this section of the Act, theft of firearms from FFLs, and increases in FFLs license fees, do not require much detailed explanation; however, you should be familiar with their content. We would invite your examination for the purpose of further discussion during informational meetings you may attend with ATF representatives in the coming weeks.

CONCLUSION

As you undertake the task of determining the impact of this new law on your jurisdiction, we want you to know that ATF representatives will be available to assist you at each turn. For example:

- ATF will provide "model laws" from other States that are being used to offset the administrative costs that will be associated with administrating Brady.
- ATF's Counsel will be available to assist those States that might be seeking to enact State firearms legislation that would qualify as an alternative to the 5-day waiting period of Brady.
- In cooperation with the Law Enforcement Television Network (LETN), ATF is making telecasts on the new law for the benefit of State and local law enforcement officials. These will be scheduled for broadcast on LETN during the coming weeks.

- ATF's Office of Compliance Operations will begin sending the CLEOs current lists of all FFLs in the CLEO's jurisdiction. They will also begin providing law enforcement officials information on FFL applicants in their jurisdictions.

For your convenience, we have enclosed a list of questions and answers that should be of additional assistance to you. If you have any questions, comments or concerns on this new law, please contact your local ATF office. If they do not have an immediate answer for you, they will find the answer and get back to you.

You may also write to us at the following address:

Mr. Terry L. Cates
Chief, Firearms and Explosives Division
Office of Compliance Operations
Bureau of Alcohol, Tobacco and Firearms
650 Massachusetts Avenue NW.
Washington, DC 20226

You may be assured that ATF will continue to be responsive to your needs.

Sincerely yours,

/s/ John W. Magaw

Director

Enclosures